STATE BOARD OF EQUALIZATION
450 N STREET, SACRAMENTO, CALIFORNIA
PO BOX 942879, SACRAMENTO, CALIFORNIA 94279-0082
916-324-2634 • FAX 916-323-3387
www.boe.ca.gov

March 20, 2007

Ms. J--- A---, CMP
President
A--- I--- M--- and E---, Inc.
XXXX --- ---, Suite X
--- ---, CA XXXXX-XXXX

Re: A--- I--- M--- and E---, Inc.
SR -- XX-XXXXXX

Dear Ms. A---:

I am responding to your letter concerning the application of the Sales and Use Tax Law to certain business operations of A--- I--- M--- and E---, Inc. (hereafter Taxpayer). In relevant part, your letter states:

> "[Taxpayer] is a full service corporate meeting and event planning company. We provide a single source of production for all types of meetings, special events and trade shows. We negotiate and procure services on our client's behalf including, but not limited to, food, beverage, transportation, leisure activities, décor, entertainment, audio visual & multi media services, premium gifts, etc. We bill our clients all products and services procured on their behalf *itemized at cost* and a separately stated *management fee* for our services in the final billing. We act as central billing and the paymaster for these programs. Any discounts received are passed on to our clients. *Our clients are ultimately responsible for the payment of all invoices from third party vendors.*
>
> "Attached please find our agency's Contract for Services[1]. We enter into this contract whenever our clients engage our services to produce a program on their behalf. Our intention in sending this to you is to ensure that we are using the required verbiage so that [Taxpayer] and our clients are protected against having to pay sales tax on our management fee. We would like to be certain that the

[1] I note that the contract was not attached to the original letter, but was e-mailed a few days later. Subsequently, when I reviewed the contract and compared it to your opinion letter request, I questioned whether the correct contract had been submitted. After I contacted Ms. D--- W---, your Director of Operations, about my concern, she provided an e-mailed copy of your "Contract For Services 2007" on February 9, 2007. This opinion is based upon a review of that contract, copy attached.

language in our contract reflects the agency relationship with our clients. We have added the highlighted language on the attached document from the numerous conversations we have had with the State Board of Equalization regarding the content necessary to alleviate this issue. We want to make sure we have targeted all issues in our agreement to imply agency status. We understand as agents of our clients we would not be required to collect sales tax on our management fee.

"]¶] … [¶]

"In addition to what is stated in our contract, we also do the following:

1. State the client name on all vendor invoices and reference[s] 'for ABC company'
2. Ensure that all taxes and labor charges are included on vendor invoices
3. Ensure that our clients sign all hotel and venue contracts

"We will do what we need to legally comply however as their 'designated agent and procuring goods and services on their behalf and at their direction and approval'. We understand that this removes us from the burden of taxing our management fee in relation to the food and beverage charges in question."

The "Contract For Services 2007" (hereafter Contract) states, in pertinent part, on page one:

"[Taxpayer] welcomes you as a client of our firm and is pleased to serve as your designated event management agency for this program. We are pleased to be of service to you for the above program and we will perform the services set forth within this proposal and contract, including all future scheduled addenda. You are securing our services to acquire goods and services on your behalf. The total estimated program cost is **$xx,xxx.** and is based on an estimated minimum participation of **xxx** persons. Please refer to the attached Schedule A for included items.[[2]]"

"A signed contract is due no later than 5 p.m. on **Day, Date**
First billing progress billing of **$xx,xxx is due on Day, Date**
Second billing progress billing of **$xx,xxx is due on Day, Date**

"Terms for scheduled payments will be in accordance with the above set payment schedule. Payments are due in our office no later than 5 p.m. on the scheduled date. Payments made by credit card will be assessed with a 4% handling fee. Additional billing will be paid to [Taxpayer] no later than 7 days from date of invoice. Any additional billing will only result from actions authorized by the persons identified on the signature page of this contract. Late payments will be assessed with an 18% per annum or 1.5% per month interest charge."

[2] No sample Schedule A was attached to the Contract.

In the statement of provisions that apply in the event the client terminates the agreement, the Contract states, in pertinent part, on page two:

> "[Client] remain[s] liable for all reasonable charges and other damages for the cancellation(s), etc., which have been authorized by you and actually incurred by [Taxpayer] as your agent. As well, [client] will remain liable for full and immediate payment within 15 days to [Taxpayer] for the management fees as listed here within."

As to what [Taxpayer] agrees to provide, the Contract states, in pertinent part, on page three:

> "[Taxpayer] agrees to provide the following event and conference management agency services as defined in the attached **Schedule A.**[3]"

Finally, the Contract states, in pertinent part, on page four:

> "[Taxpayer] agency event services are listed below with the costing for your selected elements listed in supporting addenda[4].
>
> "**Pre-Program:**
> - Source and identify a variety of sites to find the perfect venue for your event.
> - Design and create an exciting event utilizing our expertise, purchasing power and negotiation skills.
> - Negotiate contracts on client's behalf. Finalize all aspects of contracts with third party vendors. Monitor all and notify client of all changes.
> - ….
> - Select suggested menu and ensure food amounts are appropriate, supplying a great variety, sensitivity to health, ethnic and religious diversity.
> - ….
> - Set up a tasting for menu selection."

For purposes of this opinion letter, we understand and, therefore, assume that Taxpayer bills its clients for all of the tangible personal property (such as meals, food, beverages, photographs, gifts and awards) and services it obtains for them from third-party vendors, and that the vendors do not directly bill Taxpayer's clients but instead bill Taxpayer. We also assume that in addition to billing its clients at cost for all tangible personal property and services Taxpayer procures from third-party vendors on the client's behalf, Taxpayer receives no added compensation from the third-party vendors. We further understand and, therefore, assume that Taxpayer's management fee charged to each client is based upon a percentage of the charge made by Taxpayer for the tangible personal property and services it provides to the client and that the fee may additionally include an amount based upon the number of hours Taxpayer's staff works on the client's meeting, event or show.

[3] See footnote 2.
[4] No sample supporting addenda was attached to the Contract.

Discussion

As an introduction to this discussion of how tax applies to Taxpayer's transactions, we note that, except when specifically exempt by statute, California imposes a sales tax on retailers measured by the retailer's gross receipts from the retail sale of tangible personal property in this state. (Rev. & Tax. Code, § 6051.) Although the sales tax is imposed on the retailer, a retailer may collect tax reimbursement from its customers if its contract so provides. (Civ. Code, § 1656.1; California Code of Regulations, title 18, section (hereafter Regulation or Reg.[5]) 1700.) A "retailer" includes every seller who makes any retail sale or sales of tangible personal property. (Rev. & Tax. Code, § 6015, subd. (a)(1).) A "sale" is generally defined to mean and include any transfer of title or possession, in any manner or by any means whatsoever, of tangible personal property for a consideration. (Rev. & Tax. Code, § 6006, subd. (a).) A "retail sale" means a sale for any purpose other than resale in the regular course of business. (Rev. & Tax. Code, § 6007.) Finally, "gross receipts," means the total amount of the sale price, and generally includes all amounts received with respect to the sale of tangible personal property, with no deduction for the cost of materials used, labor or service costs[6], or other expenses of a retailer, unless a specific statutory exclusion applies. (Rev. & Tax. Code, § 6012, subd. (a).)

Turning to the law of agency, the California Civil Code defines an agent as, "one who represents another, called the principal, in dealings with third persons." (Civ. Code, § 2295.) The Restatement Second of Agency, section 14K, discusses the difference between an agent and a supplier of property as follows:

> "§ 14K Agent or Supplier
>
> "One who contracts to acquire property from a third person and convey it to another is the agent of the other only if he is to act primarily for the benefit of the other and not for himself."

Moreover, the Restatement Second of Agency, section 424 "Agents to Buy or to Sell," states:

> "Unless otherwise agreed, an agent employed to buy … is subject to a duty to the principal, within the limits set by the principal's directions, to be loyal to the principal's interests and to use reasonable care to obtain terms which best satisfy the manifested purposes of the principal."

Concerning price, a comment to the section further clarifies that the agent has a duty to obtain the terms most advantageous to the principal.

Thus, in order for Taxpayer to act as an agent of a client, Taxpayer must act primarily for the benefit of the client when Taxpayer contracts to obtain tangible personal property. This includes having a duty to seek contract terms with third-party vendors that are most

---

[5] All references to regulations are to sections of the California Code of Regulations, title 18.
[6] Moreover, Revenue and Taxation Code section 6012, subdivision (b)(1), specifically states that the sale price includes "[a]ny services that are a part of the sale."

advantageous in price to the client, as opposed to being most advantageous to Taxpayer, and that best serve the client's authorized specifications for the planned event.

Specific guidance related to agency status and the Sales and Use Tax Law is articulated in Sales and Use Tax Annotation[7] (hereafter Annotation or Annot.) 515.0456 (9/19/90), which provides, in relevant part:

> "With respect to the procurement of property, in order to qualify as an agent for Company A in purchasing property and not as a seller of the property to Company A, Company B should have written evidence of agency status, must clearly disclose to the supplier that it acts as an agent for Company A when making the purchases, and the price billed to Company A must be the same amount paid to the supplier.
>
> "The contract provides that Company A will pay the actual costs of such property procured by Company B and that the other charges paid by Company A attributable to such procurement would be agency fees. Assuming that Company B discloses to the suppliers that it is acting as an agent for Company A when purchasing the property, Company B is purchasing the property as agent for Company A.
>
> "If Company B provides fabrication of tangible personal property, that fabrication would be regarded as a sale and the gross receipts attributable to that sale would be subject to sales tax." (Accord Annots. 495.0385 (5/10/88) & 495.0944 (5/10/88).)

Therefore, in order to be recognized for purposes of the Sales and Use Tax Law as an agent that may obtain tangible personal property on behalf of a client, Taxpayer must do the following:

- Taxpayer must have written evidence of its status as the client's agent (this may be included in its contract with its client);
- Taxpayer must clearly disclose to all third-party vendors of tangible personal property the name of the client and that Taxpayer is acting as an agent of its client in making any purchases (note that for sales and use tax purposes, if the agency relationship is not disclosed to a vendor, we regard sales made by the vendor as sales made to the Taxpayer, *not* as sales made to the client); and
- Taxpayer must bill the same amount to the client as the third-party vendor bills to Taxpayer.

[7] Annotations are summaries of the conclusions reached in selected opinions of attorneys of the Board's Legal Department and are intended to provide guidance regarding the interpretation of Board statutes and regulations as applied by staff to specific factual situations. (See Reg. 5200.)

The Contract you submitted appears to address the first element (written evidence of agency status). However, to ensure that Taxpayer has such written evidence of its status as the client's agent, we suggest that the words "as your agent" be added in two places to the Contract: (1) on page one following the words, "You are securing our services…."[8] and (2) on page four following the words, "Negotiate contracts on client's behalf…."[9]

As to the second element (clear disclosure to third-party vendors that Taxpayer acts as an agent for the client in purchasing property), your letter indicates that Taxpayer, "[s]tate[s] the client name on all vendor invoices and reference[s] 'for ABC company'." We understand this to mean that when Taxpayer purchases tangible personal property, it informs third-party vendors of both the client's name and that Taxpayer is acting as the client's agent, and that Taxpayer further assures that the client's name and a reference "for [the named client]" is on the vendor's invoice. To ensure that this second element is clearly met, we suggest that the vendor invoices reference "*as agent* for ABC company." This caveat to include the wording "*as agent* for ABC company" also applies to hotel and venue contracts, which the client signs, in instances where sales of tangible personal property, such as food or beverages, are a part of the contract.

Last, concerning the third element (price billed to the client is the same as price billed to Taxpayer), your letter indicates that you bill the client for all property obtained on its behalf at the amount you are paying to the third-party vendor (inclusive of all discounts). Therefore, Taxpayer complies with the third element.

We note that in order to confirm in an audit that Taxpayer is the agent of its client, Taxpayer must (as you indicate it does) separately state on its invoices to the client all amounts billed to the client for tangible personal property and all amounts billed as a "management fee." Additionally, as an agent, Taxpayer may make no use for its own account of any tangible personal property it purchases for the client, and may not issue a resale certificate for any property that it purchases for the client. In the event that Taxpayer does use purchased property for its own account or issues a resale certificate when purchasing any property, the sale will be considered a purchase by Taxpayer for its own account, and *not* a purchase as an agent for the client.

Finally, we note that our opinion is based on the facts, representations, and assumptions set forth above. If the facts are different from those we describe and assume in this response, then our opinion might be different. How tax applies in any "fact-based" situation ultimately depends on what actually transpires between the parties to the contract and would be subject to audit verification. In an audit, the actual facts of the contracts and of Taxpayer's conduct would be analyzed. Thus, should any addenda, schedule or other contract terms, or actions by Taxpayer be contrary to the facts and opinions expressed in this letter, the audit might result in a finding that Taxpayer is not a true agent. However, if Taxpayer's contracts, invoices, billings and actions conform to this opinion letter, Taxpayer is acting as the agent of its clients and its management fees would not be subject to sales tax. The recommendations herein for improving the relevant contract and invoice language are solely for the purpose of facilitating ease of audit

[8] That portion of the Contract would then read, "You are securing our services *as your agent* to acquire goods and services on your behalf." (Emphasis added.)
[9] That portion of the Contract would then read, "Negotiate contracts on client's behalf *as your agent*." (Emphasis added.)

verification (which would be to Taxpayer's advantage) and are not intended to suggest that the management fees in question would be subject to tax if any of these improvements are not made.

We hope that this responds to your concerns. Should you have any further questions, please feel free to contact us again, but please also include sample addenda and schedules, as well as the appropriate contract(s), with your inquiry.

Sincerely,

Sharon Jarvis
Tax Counsel IV

SPJ:ljt

Attachment: Taxpayer's Contract for Services 2007

cc: --- --- District Administrator (--)